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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,
11 Plaintiff,
12 v.
13 JOSE JUAN FERNANDEZ,
14 Defendant.

) Criminal Case No. 08CR0802-JAH
)

) Date: June 13, 2008
) Time: 8:30 a.m.
)

) **UNITED STATES' RESPONSE AND**
) **OPPOSITION TO DEFENDANT'S MOTIONS**
) **IN LIMINE TO:**
)

-) (1) PRECLUDE EVIDENCE UNDER 404(B)
) AND 609;
) (2) GRANT ATTORNEY-CONDUCTED
) VOIR DIRE;
) (3) EXCLUDE 403 EVIDENCE;
) (4) EXCLUDE EVIDENCE OF STRUCTURE;
) (5) EXCLUDE MARIJUANA FROM
) COURTROOM;
) (6) PRECLUDE EVIDENCE OF
) PARAPHERNALIA AS IMPROPER 404(B);
) (7) PRECLUDE INTRODUCTION OF
) DOCUMENTS NOT YET PRODUCED;
) (8) ORDER PRODUCTION OF ANY
) SUPPLEMENTAL REPORTS;
) (9) PRECLUDE EVIDENCE OF POVERTY;
) (10) EXCLUDE EVIDENCE OF
) Demeanor; AND
) (11) COMPEL PRODUCTION OF GRAND
) JURY TRANSCRIPTS
24

25 COMES NOW, the plaintiff, the UNITED STATES OF AMERICA, by and through its counsel,
26 KAREN P. HEWITT, United States Attorney, and Paul L. Starita, Assistant United States Attorney, and
27 hereby files its Response and Opposition to Defendant's Motions in Limine in the above-captioned case.
28 Said Response and Opposition is based upon the files and records of this case.

I**STATEMENT OF THE CASE**

On March 19, 2008, a federal grand jury in the Southern District of California returned a two-count Indictment charging defendant JOSE JUAN FERNANDEZ (“Defendant”) with (i) importing approximately 52.40 kilograms (115.28 pounds) of marijuana into the United States in violation of 21 U.S.C. §§ 952 and 960, and (ii) possessing approximately 52.40 kilograms (115.28 pounds) of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(2). Defendant was arraigned on the Indictment on March 20, 2008, and pleaded not guilty.

II**STATEMENT OF FACTS****A. PRIMARY INSPECTION AREA**

On March 5, 2008, at approximately 6:30 a.m., Defendant, the driver and sole occupant of a 1986 Toyota pick-up truck bearing California license plates (#4EWU768), attempted to enter the United States from Mexico through the Secure Electronic Network for Travelers Rapid Inspection (“SENTRI”) lane number three at the San Ysidro, California, Port of Entry. Since Defendant was not authorized to use the SENTRI lanes, he was redirected to the standard primary inspection lanes. When Defendant arrived at the primary booth, he presented his I-551 Lawful Permanent Resident (“LPR”) card to Customs and Border Protection (“CBP”) Officer Exconde. CBP Officer Exconde explained to Defendant that he was not authorized to use the SENTRI lanes and referred Defendant and his vehicle to the Secondary Inspection Area for further processing.

B. SECONDARY INSPECTION AREA

After arriving in the Secondary Inspection Area, Defendant presented his LPR card to CBP Officer Boutwell who asked Defendant a series of standard questions. Defendant stated that he was the owner of the Toyota pick-up truck, that he had bought the truck a couple of days before, and that he had nothing to declare. Upon inspection of the vehicle registration provided by Defendant, CBP Officer Boutwell believed it to be altered or counterfeit. As such, CBP Officer Boutwell requested that a narcotics detection dog screen Defendant’s truck. The narcotics detection dog screened the truck and alerted to the front wall of the bed of the truck. CBP Officer Boutwell then lifted the camper shell off

1 the bed of the truck and discovered a non-factory compartment containing cellophane wrapped
2 packages. CBP Officer Garza completed the inspection of Defendant's truck and found 11 cellophane
3 wrapped packages concealed in the non-factory compartment and 4 additional cellophane wrapped
4 packages concealed in the camper shell. CBP Officer Garza probed one of the packages and found a
5 green leafy substance. This substance field tested positive for the presence of marijuana.

6 Later this same morning, at approximately 8:55 a.m., CBP Officer Garza had a towing company
7 contractor remove the rear tires from Defendant's truck for further inspection. The rear tires of the truck
8 were cut open revealing 10 additional cellophane wrapped packages (5 in each tire). CBP Officers
9 found a total of 25 packages which were all wrapped in duct tape, cellophane, grease or oil, packaging
10 tape, and wrapping paper with Kyocera tape (depicting flowers). The total weight of these packages
11 was approximately 52.40 kilograms (115.28 pounds).

12 **C. DEFENDANT'S POST-MIRANDA STATEMENT**

13 On this same day, at approximately 9:58 a.m., Immigration and Customs Enforcement ("ICE")
14 Special Agent Roberts advised Defendant that marijuana had been found in his truck and that he was
15 under arrest. Special Agent Roberts then advised Defendant of his Miranda rights in the English
16 language with the assistance of an acknowledgment and waiver of rights form. Defendant stated that
17 he understood his rights and was willing to answer questions. Defendant then appeared to not
18 understand the term "waiver" on the rights waiver form. The term was explained to Defendant and he
19 invoked his right to counsel. At this point, all questioning of Defendant ceased. The advisement of
20 rights and Defendant's invocation were recorded on a digital video disk ("DVD").

21 **III**

22 **POINTS AND AUTHORITIES**

23 **1. 404(B) and 609 EVIDENCE**

24 With regard to evidence that may be admitted under Federal Rule of Evidence 404(b), the United
25 States has responded more completely below. However, in sum, the United States contends that the
26 evidence that is the subject of Defendant's motions is "inextricably intertwined" with the charged
27 offenses. Further, Defendant has been provided with ample discovery on the relevant items of
28 evidence. //

1 With regard to evidence that may be admitted under Federal Rule of Evidence 609, the United
2 States does not intend to offer any evidence of this nature.

3 **2. ATTORNEY-CONDUCTED VOIR DIRE**

4 Defendant has requested the opportunity for attorney-conducted voir dire for this case. The
5 United States does not oppose this request.

6 **3. EVIDENCE OF STRUCTURE**

7 In addressing this issue, the United States incorporates by reference its briefing in its Motions
8 In Limine.

9 **4. MARIJUANA IN THE COURTROOM**

10 Defendant moves to exclude the marijuana seized from the courtroom for the duration of the
11 trial. The Court should admit the marijuana seized from the vehicle and possessed by Defendant and
12 to display it to the jury. (The United States will make arrangements to transport it to and from court and
13 will make it available to the jury should it wish to view the marijuana during deliberations.) The sheer
14 volume of the packaged marijuana demonstrates the care that was taken to ensure that the marijuana
15 reached its final destination and tends to refute any claim by Defendant that he did not know his vehicle
16 was laden with marijuana. The marijuana is highly probative to the issue of Defendant's knowledge,
17 the element of proof Defendant concedes is most at issue.

18 **5. THE NARCOTICS SCALE IS ADMISSIBLE**

19 When Defendant was arrested at the Port of Entry, a scale used to weigh narcotics was found in
20 his vehicle. The scale is evidence of Defendant's intent to distribute narcotics and should be admitted.
21 As stated above, the United States believes that this evidence is admissible because it is "inextricably
22 intertwined with the offenses charged. Further, even if the Court were to determine that this evidence
23 should be analyzed in accordance with the strictures of Federal Rule of Evidence Rule 404(b), it would
24 still be admissible.

25 Evidence of other conduct is not governed by Rule 404(b) when, as here, it is inextricably
26 intertwined with the charged offense. United States v. Lillard, 354 F.3d 850, 854 (9th Cir. 2003);
27 United States v. Beckman, 298 F.3d 788, 793-94 (9th Cir. 2002); United States v. Matthews, 240 F.3d
28 806, 817 (9th Cir. 2001). It is inextricably intertwined, for example, when necessary for the government

1 to (1) show that defendant's acts are part of a single criminal transaction or (2) to provide the jury with
2 a coherent and comprehensible account of the defendant's criminal conduct. Id. (citing United States
3 v. Vizcarra-Martinez, 66 F.3d 1006, 1012-13 (9th Cir. 1995)). See United States v. Williams, 291 F.3d
4 1180, 1189-90 (9th Cir. 2002); United States v. King, 200 F.3d 1207, 1214-15 (9th Cir. 1999). The
5 government is entitled to prove the context in which the crime occurred. United States v. Rrapi, 175
6 F.3d 742, 748 (9th Cir. 1998); United States v. Collins, 90 F.3d 1420, 1428-29 (9th Cir. 1996).

7 In United States v. Cervantes-Cardenas, CA No. 06-50182, 2007WL580004 (9th Cir. February
8 16, 2007), Ninth Circuit Court of Appeals found that evidence of the defendant carrying an image of
9 the patron saint of drug smuggling was not deemed other acts evidence governed by Rule 404(b)
10 because it was "inextricably intertwined" with the drug smuggling charges. The Court further stated
11 that the admission of said evidence was not an abuse of discretion under Rule 403 because it was
12 relevant to establish defendant's knowledge of the drugs in his vehicle. Just as concurrent possession
13 of an image of the patron of drug smuggling is relevant, intertwined evidence of knowledge in the
14 offense of drug smuggling, concurrent possession of a digital scale may be deemed relevant, intertwined
15 evidence of knowledge in the offense of possession with the intent to distribute narcotics.

16 More specifically, the Ninth Circuit Court of Appeals has upheld the admission of narcotics
17 scales as evidence of a defendant's intent to distribute narcotics. See United States v. Thompson, CA
18 No. 05-50801, 2007 WL 2044725 (9th Cir. July 16, 2007)(unpublished)(possession of scales is
19 consistently admitted as indicative of intent to distribute); United States v. Gonzales, 307 F.3d 906, 910
20 (9th Cir. 2002) (scales admissible as evidence on the theory that they are common to the practice of
21 selling drugs - they are "tools of the trade"); United States v. Savinovich, 845 F.2d 834, 837 (9th Cir.
22 1988) ("because scales constitute one of the tools of the drug trade, they are probative of intent to
23 distribute, not just possess contraband"); United States v. Tehba, 770 F.2d 1454, 1457 (9th Cir. 1985)
24 (possession of scale as evidence of intent to distribute drugs, showing intent and absence of mistake
25 under Federal Rule of Evidence 404(b)). Thus, Defendant's motion should be denied.

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1 **6. EVIDENCE NOT PRODUCED IN DISCOVERY**

2 The United States has produced or will produce all evidence that it intends to introduce in its
3 case-in-chief.

4 **7. GRAND JURY TRANSCRIPTS AND SUPPLEMENTAL REPORTS**

5 Defendant requests that the Court order the production of the Grand Jury transcripts and
6 supplemental reports related to this case. The United States will continue to abide by its discovery
7 obligations under Rule 16, Brady and its progeny, and the Jencks Act.

8 **8. DEMEANOR EVIDENCE**

9 Defendant moves for the exclusion of evidence related to Defendant's demeanor at the time of
10 her arrest. Evidence regarding a defendant's demeanor and physical appearance is admissible as
11 circumstantial evidence that is helpful to the jury's determination as to whether a defendant knew drugs
12 were concealed in the vehicle. Fed. R. Evid. 701; United States v. Hursh, 217 F.3d 761 (9th Cir. 2000)
13 (holding that jury may consider defendant's nervousness during questioning at a port of entry); United
14 States v. Fuentes-Cariaga, 209 F.3d 1140, 1144 (9th Cir. 2000) (holding that it is within the ordinary
15 province of jurors to draw inferences from an undisputed fact such as a defendant's nervousness at
16 Calexico Port of Entry); United States v. Barbosa, 906 F.2d 1366, 1368 (9th Cir. 1990) (holding that
17 jury could infer guilty knowledge from a defendant's apparent nervousness and anxiety during airport
18 inspection); United States v. Lui, 941 F.2d 844, 848 (9th Cir. 1991) (holding that jury could consider
19 guilty knowledge from a defendant's acting disinterested during airport inspection).

20 The United States' witnesses may testify about Defendant's demeanor at the time he crossed the
21 border at the Port of Entry. Customs and Border Protection Officers and ICE Agents may properly
22 testify to Defendant's behavior, demeanor, and physical appearance because they have personal
23 knowledge based upon their observations of Defendant. Accordingly, this evidence should be admitted.

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IV

CONCLUSION

For the above stated reasons, the United States respectfully requests that Defendant's Motions in Limine be denied except where expressly unopposed.

DATED: June 6, 2008

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

/s/ Paul L. Starita
PAUL L. STARITA
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United States of America
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 08CR0802-JAH
)
Plaintiff,)
)
v.)
) CERTIFICATE OF SERVICE
)
JOSE JUAN FERNANDEZ,)
)
Defendant.)
_____)

IT IS HEREBY CERTIFIED THAT:

I, PAUL L. STARITA, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of United States' Response and Opposition to Defendant's Motions In Limine, together with statement of facts and memorandum of points and authorities on the following by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. David M. C. Peterson, Esq.
Federal Defenders of San Diego, Inc.

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

1. N/A.

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 6, 2008.

/s/ Paul L. Starita
PAUL L. STARITA